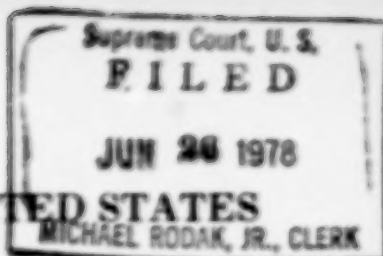


IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977



• • •

NO. 77-1688

• • •

LE ROY SYMM,

Appellant,

V.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

• • •

On Appeal From The United States District Court
For The Southern District Of Texas

• • •

MOTION TO DISMISS OR AFFIRM

• • •

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
A/C 512 475-5861

Attorneys for Appellees,
The State of Texas,
Steven C. Oaks,
Secretary of State,
and John L. Hill,
Attorney General

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MOTION TO DISMISS OR AFFIRM

* * *

The State of Texas, Steven C. Oaks, its Secretary of State*, and John L. Hill, its Attorney General, respectfully file this motion to dismiss the appeal or, alternatively, to affirm the judgment of the district court.

For many years students at Prairie View A & M University located in Waller County, Texas, have

*At the time of the filing of this suit and until October 17, 1977 when he resigned, Mark White was the Secretary of State of the State of Texas. On November 7, 1977 Steven C. Oaks was appointed to fill the vacancy and presently serves as Secretary of State. This fact was recognized in the Order of the district court dated March 3, 1978 (Appendix B1 to the Jurisdictional Statement).

attempted to register to vote in that county. They have been before the federal courts on two prior occasions: *Wilson v. Symm*, 341 F.Supp. 8 (S.D. Tex. 1972); and *Ballas v. Symm*, 351 F.Supp. 876 (S.D. Tex. 1972) *aff'd* *Ballas v. Symm*, 494 F.2d 1167 (5th Cir. 1974). Their efforts were unavailing and, with the blessings of the federal courts, Mr. Symm, as the registrar of voters of Waller County, continued to use a written questionnaire which, at least, had the effect of discouraging applicants from pressing their application to vote and resulted in a great majority of the students at Prairie View A & M University not being registered to vote in Waller County.

The practices engaged in by Mr. Symm are not employed anywhere else in the other 253 counties of the State of Texas. Nevertheless, their employment by Mr. Symm has embroiled not only Waller County but the State of Texas and its officials in litigation since *Wilson v. Symm*, *supra*, was first filed in 1971. It was then the position of the State of Texas, as it is now, that students should be entitled to vote where they considered themselves to be residents, even if that happened to be the county where they attended school and not the county where their parents resided. Twice, the Secretary of State of Texas has issued a directive prohibiting use of a questionnaire. Once, the questionnaire was held to be ineffective and now, a similar one has been upheld and enforced.

This suit was filed shortly before the 1976 general elections apparently with the hope that, through the granting of extraordinary relief, students at Prairie View A & M University would be registered to vote in the 1976 elections in Waller County. This did not come about. Finally, in early 1978 the case was resolved in the district court and students were able to register to vote and to vote in Waller County in the May 6 primary

elections and the general elections to be held in November of 1978.

The issues are not complex ones. Since the questionnaire is not used anywhere else in Texas, it is unlikely that any decision will set any important precedents. For these reasons and those set out below, the State of Texas urges the Court to either dismiss the appeal or to affirm it summarily.

CONTEST TO JURISDICTION

The Jurisdictional Statement (p. 2) predicates jurisdiction in this Court on section 1253 of Title 28, United States Code, and section 1973bb, Title 42, United States Code.

Section 1973bb directs the Attorney General to institute actions "against States or political subdivisions" for injunctive relief to implement the Twenty-sixth Article of Amendment to the Constitution of the United States. It provides that the District Courts of the United States "shall" have jurisdiction of such suits to be heard and determined by a court of three judges "and any appeal shall lie to the Supreme Court." So far we have been able to find that this statute has been judicially construed.

If the appeal provisions of section 1973bb are to be construed literally and broadly, then this Court has jurisdiction of this appeal, at least insofar as it is based on the Twenty-sixth Amendment.

On the other hand, if, as is true of section 1253, the Court construes its jurisdiction narrowly [*Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 96-98, 95 S.Ct. 293-294 (1974)], jurisdiction is lacking.

The complaint filed by the United States named as Defendants these three Appellees, Waller County and

LeRoy Symm. Waller County was alleged to be a political and geographical subdivision of the Defendant State of Texas. Symm was alleged to be the Tax Assessor-Collector (registrar of voters) of Waller County. At the same time, the United States filed its motion to convene a district court of three judges. Such a court was appointed and Appellant Symm thereafter moved to dissolve the three judge court asserting that the Twenty-sixth Amendment claim was insubstantial.

These Appellees, as Defendants, filed a motion to dismiss pursuant to Rule 12(b), Federal Rules of Civil Procedure, on the ground that the complaint failed to state a claim against any of them upon which relief might be granted.

The undisputed facts show that as early as 1972 the State of Texas, acting through its then Secretary of State Bob Bullock, attempted to resolve the problems occasioned by Appellant's use of the questionnaire only to be thwarted by the decision of the United States District Court in *Ballas v. Symm*, 351 F.Supp. 876 (S.D. Tex. 1972), in which Judge Noel characterized a bulletin issued by the Secretary of State and prohibiting use of a questionnaire

to be utterly lacking in candor or credibility;
legally incorrect; misleading; in excess of the
statutory authority; and, irrelevant.

(351 F.Supp. at 888).

The decision was affirmed by the United States Court of Appeals for the Fifth Circuit in *Ballas v. Symm*, 494 F.2d 1167 (5th Cir. 1974), which also approved use of the questionnaire finding that such use was not shown to be a violation of the Civil Rights Act. Thereafter, state officials labored under the impression that they were powerless to restrain Mr. Symm from use of the procedures he followed in determining residency.

Following the decision in *Ballas v. Symm*, the Legislature expanded the powers of the Secretary of State by adding subparagraph (b) to article 5.08, Vernon's Texas Election Code. (Appendix M1-M3 to the Jurisdictional Statement). The Secretary of State issued an emergency rule pursuant to this statute (Appendix C13 to the Jurisdictional Statement) prohibiting use of the questionnaire or any additional written information as a prerequisite to registration as a voter.

The questions presented by this suit as originally filed and certainly by this appeal are insubstantial because

(1) the suit involves only the practices of one official in one county (of 254 counties) without the approval of the State;

(2) the constitutionality of no state statute is in question;

(3) the constitutionality of no statewide practice is in question;

(4) no conduct of the state or any of its political subdivisions has been found to have deprived any person of any right guaranteed by the Constitution or laws of the United States, including the Twenty-sixth Amendment;

(5) no state official has been found to have violated any rights of any voter provided by the Constitution or laws of the United States, including the Twenty-sixth Amendment;

(6) the decision of the United States District Court has affirmed the validity of the Texas statutes and the Texas law with reference to determination of residence;

(7) the United States District Court has affirmed the authority of the Secretary of State of Texas and the

Attorney General of the State to enforce voter registration laws and directives issued to support them.

Appellant does not seek a determination by this Court that any Texas statute is unconstitutional, that the State or some political subdivision has, in fact, violated voting rights, or that any state official has violated voting rights. He does not ask that the Texas statutes with reference to residence of voters be changed. His sole claim before this Court is that the district court erred in holding that he, the registrar of voters in one of 254 counties, could not impose on applicants for registration burdens neither required nor authorized by the statutes and not imposed anywhere else in the state. *That is an insubstantial question.*

Alternatively, the State of Texas, its Secretary of State and its Attorney General are not parties to the dispute between the United States and Appellant. The United States District Court found that these Appellees had taken all practicable steps within their command to encourage Mr. Symm to apply a correct rule of law and to protect the constitutional rights of students at Prairie View A & M University. (Appendix C42 to the Jurisdictional Statement). Accordingly, no relief was granted against these Appellees (Appendix C42 to the Jurisdictional Statement; Par. 8, Appendix B5 to the Jurisdictional Statement). Only the sixth question presented by Appellant directly affects these Appellees. (Jurisdictional Statement, p. 3). And only pages 41 and 42 of the discussion in the Jurisdictional Statement are devoted to it, concluding with the statement:

Additional argument and authorities pertaining to the pendent cross-claims will be presented in a brief on the merits if permitted by the Court.

This, too, is an insubstantial question and, as to these Appellees, the appeal should be dismissed.

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED

Questions Presented

The State of Texas, its Secretary of State and the Attorney General of Texas would submit that, rather than the questions stated in the Jurisdictional Statement, the only questions presented by this appeal are:

(1) Whether the district court correctly held that the means employed by Appellant in determining whether or not an applicant for voter registration met the state requirements for registration illegally denied or abridged the rights of citizens of Waller County to vote;

(2) Whether the district court abused its discretion in enjoining the continued use by Appellant of criteria in determining whether or not an applicant for voter registration was a resident of Waller County, Texas, which criteria were neither required nor authorized by any state law;

(3) Whether the district court erred in enjoining Appellant from the continued use of the questionnaire and requiring that he register applicants for voter registration on the basis of information contained in the state-approved registration form;

(4) Whether the district court erred in holding that the State of Texas have judgment against Appellant ordering that Appellant obey Rule 004.30.05.313 of the Rules of the Secretary of State and that he cease using the written questionnaire with reference to the registration of voters in Waller County.

Statement of the Case

The Statement of the Case contained in the Jurisdictional Statement basically is correct and we will rely on it except as may be noted hereafter in this argument.

Argument

Throughout his Jurisdictional Statement, Appellant has attempted to make it appear that the judgment of the district court has overruled the established law of the State of Texas as to what constitutes residence for the purpose of voting. To the contrary, the Court has reinforced the Texas law. Appellant Symm was employing a questionnaire which had no basis in Texas law. No statute authorized it and, other than the holding of the United States Courts in *Ballas v. Symm, supra*, no court decision upheld its use.

Appellant has collected some of the Texas statutes dealing with residence for election purposes in the Appendices to his Jurisdictional Statement. Article 5.01 (Appendix K1 to the Jurisdictional Statement) and Article 5.02 (Appendix L1 to the Jurisdictional Statement) define the qualification for voting purposes in the State of Texas. A person must be 18 years of age or older, must be a citizen of the United States and a resident of the State of Texas, may not be an idiot or lunatic or a pauper and may not have been convicted of any felony except if he has been restored to full citizenship and the right of suffrage or pardoned. It is provided by Article 5.02 that no person may vote in any precinct other than that in which he resides.

Article 5.08 (Appendix M1 to the Jurisdictional Statement) defines the word "residence" to mean domicile "i.e., one's home and fixed place of habitation to which he intends to return after any temporary absence." The article contains other provisions applicable to specific situations, one of which is the residence of a student in subdivision (k). This was the subject of the decisions in *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973, cert. den'd 1974). Omitting the presumption held to be unconstitutional in *Whatley*, subsection (k) provides:

A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student.

Article 5.10a of Vernon's Texas Election Code (Appendix O1 to the Jurisdictional Statement) authorizes a person to register as a voter in the precinct in which he has his legal residence as defined in Article 5.08 if not otherwise disqualified.

Article 5.13b (Appendix A hereto) lists required information to be contained on an application form for voter registration. In subdivision (2) of the article, provision is made for certain optional information such as the number of the election precinct in which the applicant resides and the applicant's social security and telephone numbers.

Article 5.17a (Appendix P1-P2 to the Jurisdictional Statement) provides for challenge of the registration of a voter either before or after registration occurs. It provides for an appeal to a district court of the state, which court is to give priority to the appeal if an election is pending within 60 days.

Article 5.13a, (Appendix B hereto) requires that the Secretary of State prescribe the application form and a sample of the form is found in the Appendix to the Jurisdictional Statement at page R1.

The order of the district court does not touch any of these statutes in any way. It does not hold any of them to be unconstitutional or unenforceable. Quite to the contrary, it does no more than order Appellant Symm to register voters on the basis of the information contained in the official application and without asking them questions such as, Are you a college student? If so, where do you attend school? How long have you been a student at such school? Where do you live while in college? How long have you lived in Texas? In Waller County? Do you intend to reside in Waller County indefinitely? How long have you considered yourself to be a bona fide resident of Waller County? What do you plan to do when you finish your college education?, etc. These and the other questions asked by Mr. Symm of applicants for registration in Waller County are not asked anywhere else in the state.

We cannot argue with the authorities cited either in the Memorandum Opinion of the district court (Appendix C1-C43) or in the Jurisdictional Statement. As the Supreme Court of Texas said in *Mills v. Bartlett*, 377 S.W.2d 636 (Tex.Sup. 1964), "residence" involves volition, intention and action. To a large extent these are subjective. When an applicant to register as a voter is physically present in Waller County and says that it is both his intention and will that he be a resident of Waller County, questions as to whether he has a job in the county, owns a home in the county, has an automobile registered in the county, lists his telephone in the county, and others of that sort, shed little light on whether, in fact, at that time he is a resident.

In effect, Appellant says that certain indicia can form the basis for a prediction that a person will not remain in Waller County and thus that he lacks the necessary intent to remain indefinitely. But the same may be true of persons who have resided in Waller County all their lives. The probability may be less, but some of those persons will leave and will become residents of other places. If the latter are not denied the right to vote, why should the former?

The district court held that the procedure used by Appellant Symm, including the questionnaire, is not a valid test of whether a person is, at that time, a resident of Waller County and that its use had the effect of deterring persons from applying for voter registration. The court did not say that Mr. Symm could not apply the statutory tests or that he could not refuse to register an applicant.

When viewed in this light, it is obvious that the decision of the district court was a correct one and should be summarily affirmed.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
A/C 512 475-5861

Attorneys for Appellees,
The State of Texas,
Steven C. Oaks,
Secretary of State,
and John L. Hill,
Attorney General

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Motion to Dismiss or Affirm has been placed, postage prepaid, in the United States First Class Mail on this the ____ day of June, 1978, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Sears & Burns
Mr. Michael T. Powell
Attorneys at Law
Suite 823, 2 Houston Center
Houston, Texas 77002

Mr. John MacCoon
Attorney
Civil Rights Division
Department of Justice
Washington, D.C. 20530

DAVID M. KENDALL

APPENDIX A

Art. 5.13b. Information on application.

Subdivision 1. Required information. An application form for voter registration shall provide that the following required information be furnished by the applicant:

(1) The applicant's first name, middle name (if any), and surname. If the applicant is a married woman using her husband's surname, she shall furnish her first name, maiden name, and husband's surname.

(2) The applicant's sex.

(3) The month, day, and year of the applicant's birth, and city or county and state, or foreign country, where the applicant was born.

(4) A statement that the applicant is a citizen of the United States.

(5) If a naturalized citizen, the court of naturalization, or its location.

(6) A statement that the applicant is a resident of the county.

(7) If the applicant is currently registered in another county or if the applicant was registered in the previous two-year certificate period in any county in the state and has not received a registration certificate for the current two-year certificate period, the name of that county and the applicant's residence address as shown on such registration certificate.

(8) The registrant's complete current permanent residence address (including apartment number, if any); or, in none, a concise description of the location of the registrant's residence.

(9) The address to which the registration certificate is to be mailed, but only if mail cannot be delivered to the registrant's permanent residence.

(10) If the application is made by an agent, a statement of the agent's relationship to the applicant.

Subdivision 2. Optional information. The application form shall contain a space for showing the election precinct in which the applicant resides, but an application is not deficient for failure to list the number or name of the precinct or for listing an incorrect number or name where the applicant's correct permanent residence address is given. It shall also contain a space for the applicant's social security number and telephone number, but an application is not deficient for failure to list these numbers. However, should it be made possible for the state to require that a registrant provide his social security number when applying for a registration certificate, the providing of such a number by all those applicants who possess such a number may be made mandatory by directive of the Secretary of State in the exercise of his authority pursuant to the provisions of Art. 1.03. The registrar shall not transcribe, copy, or record any telephone number furnished on an application for registration.

APPENDIX B

Art. 5.13a. Mode of applying for registration; period for which registration is effective.

Subdivision 1. Registration shall be conducted at all times the registrar's office is open for business. A person may apply for registration in person or by mail. Each applicant shall submit to the registrar of the county in which he resides a written application which supplies all the information required by Article 5.13b, Vernon's Texas Election Code. The Secretary of State shall prescribe the application form. The application for registration by mail shall be in the form of a business reply postcard, or other suitable form, with postage to be paid by the state. The Secretary of State shall make necessary arrangements with the United States Postal Service for obtaining a permit for use of the business reply mail form, or other suitable form, and for payment of the postal charges through warrants issued by the comptroller of public accounts. The Secretary of State shall be authorized to use any form or system made available by the United States Postal Service if such other form or system will be less costly than business reply, and he shall be authorized to implement any procedures necessary to accommodate such other form or system. The applications shall be available to individuals, organizations, businesses, and political subdivisions in reasonable quantities. No fee shall ever be charged for voter registration applications. The Secretary of State may prescribe one or more forms for use in counties using electronic data processing methods for issuing voter registration certificates and a different form for use in counties not using those methods, but the registrar in each county shall accept any application made upon any form prescribed by the Secretary of State which supplies all the necessary information for registration. In addition to other

requirements, the application form shall contain the following statement: "I understand that the giving of false information to procure the registration of a voter is a felony." It shall also contain a space for recording the number of the voter's registration certificate.

Subdivision 2. The application shall be signed by the applicant or his agent. However, if the person making the application is unable to sign his name either because of physical disability or illiteracy, he shall affix his mark, if able to do so, which shall be attested by a witness, whose signature and address shall be shown on the application. If a person making the application is physically unable to make a mark, the witness shall so state on the application.

Subdivision 3. The husband, wife, father, mother, son, or daughter of a person entitled to register may act as agent for such person in applying for registration, without the necessity of written authorization therefor, may sign for the applicant, and may receive the registration certificate. However, none of these persons may act as agent unless he is a qualified elector of the county. No person other than those mentioned in this subdivision may act as agent for a person in applying for registration. Except as permitted in this subdivision, a person who wilfully acts as agent for another in applying for registration or in obtaining a registration certificate is guilty of a Class B misdemeanor.

Subdivision 4. A registration becomes effective on the 30th day after the date on which the registrar receives the application or on the day that the registrant attains the age of 18 years (the day before his 18th birthday), whichever is later. An application by mail is deemed to have been received by the registrar when it is actually placed into the possession of the registrar or his agent by a post-office employee, or is deposited in the

registrar's mail box, or is left at the usual place of delivery for the registrar's official mail. If the registrar is unable to determine the exact date on which the application is deposited in his mail box, he shall treat it as having been deposited on the date of the last previous removal of mail from the box. Every registration of a voter which becomes effective on or after March 1, 1976, shall continue in effect until cancelled under some provision of this code.

Subdivision 5. Any person who applies for registration of any person, or who signs an application purporting to be the application for registration of any person, either real or fictitious, other than the person making the application or affixing the signature, or someone for whom he may lawfully act as agent, or someone who is unable to sign and who requests him to sign for such other person, is guilty of a felony of the third degree.